47

(2)

No. 06-1074

Supreme Court, U.S.
FILED
MAR 05 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RUSSELL P. BUTLER,

Petitioner,

v.

UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CRIMINAL ACTION NO. H-04-25 (S-2),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ESTATE OF KENNETH L. LAY

JOHN H. RAY, III
F. TURNER BUFORD
ROPES & GRAY LLP
One International Place
Boston, MA 02110
(617) 951-7000

SAMUEL J. BUFFONE*
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005
(202) 508-4657

Counsel for Respondent Estate of Kenneth L. Lay

* *Counsel of Record*

207164

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the procedural right to "full and timely restitution *as provided in law*" afforded to statutory crime victims under the Crime Victims Rights Act, 18 U.S.C. § 3771, changed existing substantive law governing restitution.

2. Whether Butler may raise the procedural rights afforded to statutorily defined crime victims under the Crime Victims Rights Act without making a *prima facie* showing that he suffered a harm directly and proximately caused by the offense alleged in the indictment.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Estate of Kenneth L. Lay is not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	3
I. The Only Question Properly Presented To This Court – Whether The CVRA Changed Existing Law Concerning Restitution – Is Unworthy Of Certiorari.	3
A. The CVRA Did Not Change Existing Law.	4
B. Crime Victims Do Not Have the Right To Challenge The Propriety of an Order Setting Aside a Criminal Conviction Under the CVRA.	7
C. Certiorari is Unwarranted in this Case.	10
II. Petitioner Has Made No Evidentiary Showing That He Is A "Crime Victim" Under The CVRA And Therefore Lacks Standing.	11
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

American Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 6

Cheney v. U.S. Dist. Court for the District of Columbia,
542 U.S. 367 (2004) 7

Hudson v. Palmer,
468 U.S. 517 (1984) 6

Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.,
474 U.S. 494 (1986) 5

Theriot v. Parish of Jefferson,
185 F.3d 477 (5th Cir. 1999) 11

United States v. Asset,
990 F.2d 208 (5th Cir. 1993) 10

United States v. Christopher,
273 F.3d 294 (3rd Cir. 2001) 10

United States v. Cloud,
921 F.2d 225 (9th Cir. 1990) 10

United States v. Dudley,
739 F.2d 175 (4th Cir.1984) 10

United States v. Estate of Parsons,
367 F.3d 409 (5th Cir. 2004) ..... *passim*

Page

United States v. Koblan,
No. 05-13038, 2007 WL 474953
(11th Cir. Feb. 15, 2007) 10

United States v. Logal,
106 F.3d 1547 (10th Cir. 1997) 5, 10

United States v. Mmahat,
106 F.3d 89 (5th Cir. 1997) 10

FEDERAL STATUTES

18 U.S.C. § 3771 ..... *passim*

18 U.S.C. § 3663A 6

RULES

Fed. R. Crim. P. 29 8

S. Ct. R. 10 10

OTHER

H. R. Rep. No. 108-711 (2004) 5, 9

STATEMENT OF THE CASE

After his conviction on May 25, 2006, Kenneth L. Lay retained appellate counsel to appeal his conviction. Before he could pursue his appeal and indeed, before he was even sentenced, Mr. Lay died of a heart attack on July 5, 2006. No presentence report was prepared at the time of his death, and none was ever filed with the District Court. Under the direction of his widow, the executrix of his estate, the Estate of Kenneth L. Lay moved in the District Court to substitute itself for Mr. Lay in order to file a motion to vacate his conviction and dismiss the indictment consistent with the longstanding federal doctrine of abatement. The Lay Estate filed such a motion on August 16, 2006. The United States did not dispute that controlling precedent required abatement but requested that the District Court defer ruling so that the Department of Justice could seek legislation to change existing abatement law to allow for potential restitution to crime victims after the death of a criminal defendant.

On September 15, 2006, Russell P. Butler, who had never before appeared in the proceeding, through his attorneys, filed a motion seeking an order of restitution. The motion was based on his claim that the Crime Victims Rights Act, 18 U.S.C. § 3771 ("CVRA"), had changed existing abatement law as it related to restitution and that accordingly the case should not be abated. The Lay Estate filed an opposition to Mr. Butler's motion, rebutting the claim that the CVRA granted any more than the procedural right to "restitution as provided in law" (the exact words of the statute), and noting that Mr. Butler had failed to make any evidentiary showing that he was a "crime victim" as defined in the statute and thus had no standing. Mr. Butler never submitted any evidence to the District Court to establish his statutory capacity as a crime victim.

On October 17, 2006, the District Court denied Mr. Butler's motion, following controlling precedent in the Fifth Circuit and the uniform consensus among all of the parties that the CVRA did not change existing law and that the Lay Estate was entitled to have the conviction vacated and the indictment dismissed, relief which the District Court granted. The District Court held that

> [s]ince the Fifth Circuit Court of Appeals has adopted the abatement rule, and since neither the United States nor Butler has raised any legal basis for denying the rule's application in this case, the court concludes that Lay's conviction must be vacated and that this action against him must be denied.

(Cert. Pet. at App. 16). The United States appealed, but subsequently filed an unopposed motion to withdraw its appeal, which the Fifth Circuit granted on January 24, 2007.

On October 26, 2007, Mr. Butler filed a petition for a writ of mandamus in the Fifth Circuit (a limited procedure provided to crime victims in the CVRA, § 3771(d)(3)), seeking a writ directing the District Court to order restitution (the "Mandamus Petition"). In support of the Mandamus Petition, Mr. Butler again claimed that the right to "full and timely restitution as provided in law" did not incorporate existing law, but changed it, thereby abrogating the Fifth Circuit's *en banc* decision in *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004), which held that restitution could not be ordered when the underlying conviction abated upon the death of the defendant prior to appeal.

Addressing for the first time his evidentiary burden to show standing, Mr. Butler attached to the Mandamus Petition

an unsworn document purporting to be a letter and bank statement from UBS Financial Services Inc. showing that he owned Enron shares. The letter, by its own terms, did not show the "original purchase price and date of the Enron Corporation stock" (Mandamus Pet., Ex. E at 1). On the basis of this document, Mr. Butler asked the Fifth Circuit to find that he was a "crime victim" as defined by the CVRA. The United States did not take a position on the Mandamus Petition.

On November 1, 2007, the Fifth Circuit denied the Mandamus Petition without addressing Mr. Butler's standing as a statutory crime victim under the CVRA. The Fifth Circuit held that "[w]e find nothing in the CVRA or other legislation, either express or implicit, that purports to exempt the provisions of that act from the venerable abatement doctrine" (Cert. Pet. at App. 2). Mr. Butler now petitions this Court for a writ of certiorari.

ARGUMENT

I. The Only Question Properly Presented To This Court – Whether The CVRA Changed Existing Law Concerning Restitution – Is Unworthy Of Certiorari.

The issues of the proper substantive scope of restitution or abatement in the now-dismissed case of *United States v. Lay*, and the continuing validity of *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004), are not properly before this Court and should not be addressed on this Petition. Those are issues that the United States elected not to pursue through a direct appeal of the abatement order entered by the District Court. This mandamus proceeding, *Butler v. United States District Court for the Southern District of Texas*, is limited

to the scope of the Crime Victims Rights Act, 18 U.S.C. § 3771, and the rights enumerated therein, which are the only rights Petitioner, a self-proclaimed crime victim, could potentially raise if he had standing to assert them.

A. The CVRA Did Not Change Existing Law.

Throughout the proceedings below, Petitioner has claimed that the CVRA changed the law with respect to restitution, and created new substantive rights to restitution and, in particular, a continuing right to restitution following the death of a criminal defendant prior to his ability to prosecute an appeal of his conviction.

Petitioner's position is clear on the record. In his "Issues Presented" statement to the Fifth Circuit, Petitioner stated: "The District Court committed legal error of law by failing to consider and apply the Crime Victims Rights Act guaranteeing fairness to the crime victims resulting in the Court refusing to order statutorily mandated restitution . . . ." (Mandamus Pet. at 7-8).[1] In the Mandamus Petition, Petitioner argued that "Congress's passage of the Crime Victims Rights Act . . . clarifies that mandatory restitution pursuant to the Mandatory Victims Restitution Act is indeed mandatory thus clarifying a split amongst the circuits" (Mandamus Pet. at 11) and that "the recently enacted CVRA codified in 18 U.S.C. § 3771 overcomes the common law doctrine of abatement in so far as it vacates a victim's right to restitution" (Mandamus Pet. at 13).

The Fifth Circuit resolved those issues with little difficulty:

> The district court's order was grounded in the doctrine of abatement, as most recently recognized

1. Petitioner claimed in the District Court that "[t]he CVRA calls in [*sic*] question existing case law thus requiring courts to reconsider prior decisions which did not adequately consider the property interests of crime victims" (Mem. In Supp. of Victim's Mot. Opposing Mot. of the Estate of Lay at 6).

> for this circuit in *United States of America v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004) (en banc). We decline to issue a writ of mandamus.
>
> That our en banc decision in *Parsons* predated the CVRA is of no import. We find nothing in the CVRA or other legislation, either express or implicit, that purports to exempt the provisions of that act from the venerable abatement doctrine. The CVRA provides only that a crime victim is entitled to "full and timely restitution *as provided in law*."

(Cert. Pet. at App. 2) (emphasis in original).

Petitioner has presented the same question to this Court – whether the CVRA changed existing law governing restitution in the abatement context (Cert. Pet. at *i* (Question Presented No. 1)) – and the Court may answer it with similar ease. In enacting the CVRA, Congress did not alter or enlarge the then-existing law governing restitution. The use of the phrase "as provided in law" to modify the "restitution" promised by the CVRA makes this perfectly clear – as does the CVRA's legislative history. H. R. Rep. No. 108-711, at 10-11 (2004), *as reprinted in* 2005 U.S.C.C.A.N. 2274, 2283 (This section ... *makes no changes in the law* with respect to victim's ability to get restitution." (emphasis added)).

This Court has held that to change existing law, Congress must make its intent specific, and cannot be presumed to have done so *sub silentio*. *Midlantic Nat'l. Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). But Petitioner can point to no authority to show that Congress intended to change existing law through the CVRA.[2]

---

2. Existing law in at least two federal circuits provided for abatement of a restitution order along with a conviction at the time the CVRA was enacted. *Parsons*, 367 F.3d. 409; *United States v. Logal*, 106 F.3d 1547 (10th Cir. 1997). Congress could have, but did (Cont'd)

Indeed, the CVRA does not support the proposition that the estate of a defendant whose conviction has been vacated, by reason of death, should nonetheless pay restitution. Congress' silence is significant, particularly since Petitioner's interpretation of the CVRA would place it in conflict with the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, which provides for restitution only "when sentencing a defendant *convicted* of an offense." (emphasis added). In addition, the CVRA does not articulate a new standard for courts to apply to the determination of restitution. Instead, the CVRA explicitly incorporates by reference existing, substantive restitution law. 18 U.S.C. § 3771(a)(6) (affording restitution "as provided in law"). It is clear therefore that the CVRA did not change existing law and that Petitioner is not entitled to restitution because the underlying conviction abated as required by controlling circuit precedent.[3]

(Cont'd)
not, change the existing law. Further supporting the conclusion that the CVRA did not change existing law, in the proceedings below, the United States Department of Justice rejected Petitioner's arguments and instead drafted proposed legislation that it claimed was a necessary change of existing law. Petitioner himself submitted evidence to the Fifth Circuit (improperly) from United States Senator Diane Feinstein that she "plan[ned] to introduce legislation . . . to address the issue of abatement after a criminal defendant's death," and urged the United States to appeal to preserve potential restitution for supposed crime victims. (Mandamus Pet., Ex. F at 1-2).

3. Petitioner's Due Process and Takings arguments are therefore frivolous because he had no protected property interest in restitution against a defendant whose conviction was vacated by operation of abatement. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'"); *Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) ("The Due Process and Takings Clauses of the Fifth and Fourteenth Amendments stand directly in opposition to state action intended to deprive people of their legally protected property interests.").

B. Crime Victims Do Not Have the Right To Challenge The Propriety of an Order Setting Aside a Criminal Conviction Under the CVRA.

The facial language and overall structure of the CVRA compels the conclusion that Congress did not intend for the CVRA and its expedited mandamus provisions to be used by crime victims to challenge substantive questions of law as Petitioner seeks to do in this case by challenging the abatement doctrine as confirmed in *Parsons*. Under the CVRA, crime victims are not given a right of direct appeal to enforce the enumerated rights afforded them in § 3771(a) of the statute. 18 U.S.C. § 3771(d)(4) ("In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates."). To protect their rights, Congress only provided crime victims a limited mechanism to petition the Courts of Appeals for a writ of mandamus. § 3771(d)(3).

Traditionally, a writ of mandamus has been considered a "drastic and extraordinary remedy" appropriate only in situations involving a "judicial usurpation of power or a clear abuse of discretion." *See, e.g., Cheney v. U.S. Dist. Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Congress was aware of that history and it informs the scope of mandamus afforded crime victims under the CVRA.

The expedited timetable prescribed by the CVRA is a further indication that its mandamus provisions are limited to discrete procedural questions – not substantive issues of law or challenges to the propriety of orders setting aside criminal convictions. Under the CVRA, a Court of Appeals is obliged to "take up and decide [an] application [for a writ of mandamus] forthwith *within 72 hours after the petition*

has been filed." 18 U.S.C. § 3771(d)(3) (emphasis added). The CVRA provides that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter." *Id.*

In interpreting the scope of the mandamus procedure crafted by Congress, the CVRA cannot be read to allow crime victims to challenge anything more than whether they received the procedural rights afforded by the statute. The right to "full and timely restitution as provided in law" therefore must be limited to the procedures employed by the district court in determining the scope of and entitlement to restitution during a sentencing of a criminal defendant.

Any more expansive reading is simply inconsistent with the purpose of the statute. For example, in this case, Petitioner claims that he has the right to challenge the law on abatement because it effectively denied him restitution. Accepting this proposition requires the Court to accept that almost any substantive question of law that might preclude restitution could equally be brought up on mandamus under the CVRA.

Consider, for example, a case where instead of vacating the conviction because of abatement, the district court vacates a conviction pursuant to Federal Rule of Criminal Procedure 29 and grants a judgment of acquittal following a guilty verdict. Under Petitioner's theory, while the United States could seek an appeal, he could nonetheless seek a writ of mandamus, challenging the underlying Rule 29 decision under the theory that the judgment of acquittal precluded full and timely restitution. The Court of Appeals would have to review the entire trial record and reach a conclusion, in a written opinion, within 72 hours, thereby preempting a full appeal by the United States.

Moreover, under Petitioner's theory, any denial or limitation of restitution is inconsistent with the CVRA, and every crime victim can seek a writ of mandamus under the CVRA's expedited procedures to challenge the calculation of restitution or any finding that has the effect of limiting or denying restitution. Such actions would force the Courts of Appeals to decide complex questions normally resolved through the direct appeal process in expedited CVRA mandamus proceedings. There can be no question that Congress did not have this in mind, and that the CVRA does not provide for this type of review in its limited mandamus provisions.

The scope of the right to "full and timely restitution as provided in law," must be understood within the broader context of the CVRA – a statute whose overarching purpose was to ensure the participation of crime victims in the criminal process. *See, e.g.*, 18 U.S.C. § 3771(a)(2) (affording the "right to reasonable, accurate, and timely notice of any public court proceeding"); § 3771(a)(4) (affording the "right to be reasonably heard at any public proceeding in the district court"); § 3771(a)(5) (affording the "reasonable right to confer with the attorney for the Government in the case"); *see also* H. R. Rep. No. 108-711, at 3, *as reprinted in* 2005 U.S.C.C.A.N. 2274, 2276 ("Victims of crime often *do not feel their voices are heard or that their concerns are adequately addressed in the judicial process*." (emphasis added)).[4] The right to full and timely restitution, understood in the context of these other rights, is limited. The CVRA

4. It should be pointed out that Mr. Butler (to the extent he is a victim), along with other Enron shareholders, is not without a remedy. Civil lawsuits have been filed and settled for substantial sums to compensate shareholders. *See* Tom Fowler, *Cooperation could pay off for Fastow*, HOUSTON CHRONICLE, Sept. 26, 2006 *available at* http://www.houstonchronicle.com /CS/CDA/ printstory.mpl /front/4214118 (noting that shareholders have negotiated approximately $7.3 billion in settlement with various parties).

did not change the law nor provide crime victims the right to challenge the law, only the right to have the law applied.

C. Certiorari is Unwarranted in this Case.

Because the question presented by Petitioner is straightforward, this is not a case worthy of certiorari. *See* S. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). There is no circuit split on the CVRA question presented – no court has held that the CVRA changed any underlying substantive law concerning restitution or abatement.[5]

The majority position and recent trend in the federal courts endorses the abatement of restitution orders. *See*, *supra*, note 5. There is simply no reason for this Court to address the limited question presented since Petitioner has not even made a colorable argument that the CVRA changed the law surrounding restitution as drastically as he proposes.

---

5. The split that Petitioner suggests as to the substantive question of abatement of restitution on the death of the defendant before appeal is not as compelling (or favorable) as he suggests. *United States v. Cloud*, 921 F.2d 225 (9th Cir. 1990) was not an abatement case; indeed, the defendant himself prosecuted that appeal, his second after the court had already affirmed his conviction. *United States v. Asset*, 990 F.2d 208 (5th Cir. 1993) was overruled by *Parsons*, and nonetheless only addressed voluntary restitution already paid by a defendant pursuant to a plea agreement. *United States v. Christopher*, 273 F.3d 294 (3rd Cir. 2001), relied on *United States v. Mmahat*, 106 F.3d 89 (5th Cir. 1997), which was overruled by *Parsons*, calling into question whether *Christopher* is still good law. *United States v. Dudley*, 739 F.2d 175 (4th Cir. 1984) was decided prior to *Parsons* and *United States v. Logal*, 106 F.3d 1547 (10th Cir. 1997). The Eleventh Circuit recently clarified that its precedent required abatement of restitution. *United States v. Koblan*, No. 05-13038, 2007 WL 474953 (11th Cir. Feb. 15, 2007). Abatement of restitution is the majority position and has been the recent trend in federal courts.

II. Petitioner Has Made No Evidentiary Showing That He Is A "Crime Victim" Under The CVRA And Therefore Lacks Standing.

Petitioner has offered no basis to assert the rights of a crime victim as defined in the CVRA. Petitioner failed to submit any evidence to the District Court establishing his standing, but simply claimed that he owned Enron shares that lost value. In the Fifth Circuit, for the first time, Petitioner attached an unsworn document purporting to be a letter and statement from UBS Financial Services Inc. allegedly showing that he owned Enron shares that lost value, but also stating "[r]egrettably, UBS Financial Services does not have the information pertaining to the original purchase price and date of the Enron Corporation Stock. . . ." (Mandamus Pet., Ex. E at 1). This so-called "evidence" was improperly submitted to the Fifth Circuit, *see Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999), and does not come close to even a minimal showing that Petitioner was "directly and proximately harmed as a result of the commission of a federal offense," as required by 18 U.S.C. § 3771(e).

Petitioner has made no effort to connect any loss he supposedly suffered directly and proximately to the allegations concerning the criminal offenses in the now-dismissed indictment. Neither the District Court nor the Fifth Circuit has ever made any such determination or recognized Petitioner as a crime victim, instead rejecting his arguments on the merits. Petitioner has no standing to assert any rights under the CVRA, and his petition must be dismissed.

CONCLUSION

For all of the foregoing reasons, Respondent Estate of Kenneth L. Lay respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,

SAMUEL J. BUFFONE*
ROPES & GRAY LLP
One Metro Center
700 12th Street, NW
Suite 900
Washington, DC 20005
(202) 508-4657

JOHN H. RAY, III
F. TURNER BUFORD
ROPES & GRAY LLP
One International Place
Boston, MA 02110
(617) 951-7000

Counsel for Respondent Estate of Kenneth L. Lay

* *Counsel of Record*